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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEOVANNY BENAVENTE et al.,

Defendants and Appellants.

B209514

(Los Angeles County  
Super. Ct. No. BA281416)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Michael E. Pastor, Judge. Affirmed.

Diane B. Carey for Defendant and Appellant Geovanny Benavente.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Max Steven Fuentes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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Max Steven Fuentes and Geovanny Benavente appeal from the judgment entered after they were convicted of second degree murder and other related counts stemming from a gang-motivated shooting. We reject Fuentes's claims that his statement to the police should not have been allowed into evidence because he was not properly advised of his right to remain silent, and that the jury should have been instructed on involuntary manslaughter. We reject Fuentes and Benavente's joint claims that: the trial court erred by allowing in evidence the hearsay statement of an accomplice who was not available at trial; the prosecutor committed misconduct by commenting on Benavente's failure to testify; and there was insufficient evidence to support the verdicts.

### **FACTS AND PROCEDURAL HISTORY**

In the early morning hours of April 19, 2004, Jesse Dominguez was shot and killed and E.A. was shot and wounded as they left a party at the house of R.R., located on the north side of Fostoria Street in Bell Gardens. The fuse for the shooting was lit a short time earlier when several members of the Fostoria Boys gang tried to crash the party. R.R.'s uncle let them enter in order to keep the peace, but Dominguez shouted at the group that if they caused trouble, they would have to deal with him. One of the crashers began pacing back and forth in front of the R.R. house, saying, "Fuck that. This is our neighborhood."

Eventually, the group of crashers swelled to as many as 15 young men, who had moved out to the front of the house, near the curb. E.A., who belonged to the Tortilla Flats gang, decided to leave, and Dominguez, T.M., and another man went with him. T.M. walked to his car, which was parked on the north side of Fostoria Street. Dominguez and the other man walked with E.A. to E.A.'s silver Toyota, which was parked on the south side of the street, across from the R.R. house. The third man sat in the front passenger seat, and Dominguez got in the seat behind E.A.

According to T.M., as E.A. began backing up his car, a small teenager wearing a hooded sweatshirt ran up to E.A.'s car and began pounding on the rear window with a handgun. That person then fired several shots into E.A.'s car through the rear window.

E.A. jumped from the car and ran, but was shot twice in the leg. T.M. heard four or five gunshots and ducked between two nearby parked cars. He then heard “a bunch of shots going off at the same time.” When it seemed the shooting had stopped, he saw someone shooting in the direction of E.A.’s car as that person ran west on Fostoria Street away from the scene.

W.M. lived in the house directly across the street from the R.R. house. W.M. was hosting a baptismal party that night and had been paying attention to the party crashers because they looked like gang members and he did not believe they had been invited to the R.R. party. A green Cadillac belonging to one of the crashers had also parked halfway in W.M.’s driveway. W.M. heard one of the crashers say, “Fuck that fool,” then saw that person reach into the Cadillac, pull out a handgun, and begin firing at E.A.’s car. From across the street, W.M. saw two muzzle flashes from another gun being fired. The shooting appeared to go on for a long time, W.M. said, and he was afraid his house would be caught in the “cross fire.”

At around 1:30 a.m., Bell Gardens Police Officer Juan Barajas was handling a domestic disturbance call a few blocks away from the R.R. house when he heard about 15 gunshots. He ran to his patrol car and drove toward the area where the shots came from. As he drove down an alley about a block away from the R.R. house, he saw four Hispanic men running down the alley. One was wearing a white sweatshirt. Another one wore dark clothing and appeared to be carrying a gun. Barajas did not see what the other two men were wearing. Barajas drove off, taking a route that would allow him to intercept the four men, but lost sight of them as they ran behind a motor home. He sped up, and when he saw the man in the white sweatshirt running by, stopped his car, got out, and began to chase him. That man was Geovanny Benavente. Barajas pulled out his gun and ordered Benavente to stop and show his hands. Benavente halted, pulled a handgun from his waistband, tossed it on the roof of a nearby church, and ran back in the direction of the motor home.

Officer Barajas again lost sight of Benavente as Benavente ran behind the motor home. When Benavente reappeared, Barajas saw someone else running about 10 yards

ahead of Benavente. Barajas caught up to Benavente near a parked car and tried to grab him. Benavente jumped over the trunk of the car and fell to the ground. When Barajas ordered Benavente to show his hands, Benavente “popped up” with his back to Barajas, but did not show his hands. Believing that Benavente might have another gun, Barajas moved to one side and shot Benavente. Benavente ran off, and as Barajas renewed the chase, he stumbled over Max Fuentes, who was lying face down on the ground near the front tire of the parked car.

Fuentes, age 16, was arrested and taken to the police station, where he was interviewed and gave a recorded statement. Fuentes first told the officers that he went to the party with a friend named Steve, that he was not involved in the dispute, that he did not have a gun, and that he ran after the shooting started because he did not want to get shot. He denied belonging to the Fostoria Boys gang, claiming instead that he belonged to a tagging crew known as Crazy Evil Felons or KEP.

When Fuentes was first brought in to the station, a gunpowder residue test of his hands was conducted. Even though that test turned up negative, the officers told Fuentes halfway through the interview that the test had come back positive.<sup>1</sup> When confronted with that ruse, Fuentes said he brought a chrome nine-millimeter handgun to the party for protection because a gang called LFT had recently attacked him. Fuentes claimed that after he heard the gunshots, he ran outside to the front of the R.R. house and fired his gun up into the air from “[j]ust boredom.” He did not shoot at anyone and did not intend to shoot at anyone. Later, he said he went to see what was happening and started shooting. He ran, but slipped on some wet grass not far from the R.R. house and dropped his gun there. He continued to deny membership in the Fostoria Boys gang throughout the interview.

Police officers found a Hi-Point nine-millimeter handgun on a lawn on the south side of Fostoria Street just west of the R.R. house. Fuentes concedes that was his gun,

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<sup>1</sup> Fuentes had been placed in a holding cell with a sink and washed his hands before the test was taken.

and that he was the man T.M. saw firing a gun as he ran westbound on Fostoria Street. Ballistics tests showed that four different guns were used during the attack. The murder weapon, which was never found, was a .25-caliber gun, and it did not appear that Fuentes or Benavente fired any of the rounds that struck Dominguez or E.A. However, one round fired by Fuentes struck and penetrated the trunk of E.A.'s car. Another hit a red Toyota parked on the north side of Fostoria, and a third was found lodged in the wall of a house on the south side of Fostoria Street, just east of the R.R. house. Several shell casings from Fuentes's gun were also found, and they were spread out in a pattern that indicated he had been moving away from the scene in a westerly direction. A crime scene reconstruction expert also concluded that Fuentes had fired with his arm pointed at a somewhat downward angle as he ran west on Fostoria Street.

Police officers also recovered the nine-millimeter Ruger handgun that Officer Barajas saw Benavente toss onto the church roof. Five fired bullets, one bullet fragment, and 14 expended shell casings from the Ruger were found at the scene of the shooting along the north side of Fostoria Street.

The weapons were fingerprint tested, but no prints were found. According to the examiner, prints are found less than 10 percent of the time. Tests for DNA evidence on the guns were not conducted.

A police gang expert testified that he knew Benavente to be a member of the Fostoria Boys gang. The same expert did not know Fuentes, but testified that a few days after the shooting, Fuentes admitted that he joined the gang two months earlier. At the time of the trial, Fuentes had the word "Fostoria" tattooed on his neck, but the tattoo was not there when Fuentes had earlier admitted his Fostoria membership. According to the expert, the shooting was in retaliation for the disrespect the Fostoria Boys were shown at the R.R. party, and was committed in association with and for the benefit of that gang.

Fuentes and Benavente were charged with the murder of Dominguez and the attempted murder of E.A. Because they did not fire the shots that struck the two victims, they were tried on the theory that they aided and abetted their fellow gang members, including the person or persons who did shoot Dominguez and E.A. They were also

charged with shooting at an occupied motor vehicle. (Pen. Code, § 246.) Benavente was charged with being a felon in possession of a firearm. Various firearm-use related enhancements were also charged. They were convicted of the murder and shooting at a vehicle counts, but acquitted of the attempted murder count. Each received a combined state prison term of 40 years to life.<sup>2</sup>

## DISCUSSION

### 1. *Fuentes's Miranda Rights Were Not Violated*

In *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the Supreme Court held that in order to protect a suspect's Fifth Amendment privilege against self-incrimination, a suspect in custody must be advised of certain rights before questioning begins. These are: the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of a lawyer; and if he cannot afford a lawyer, one will be appointed for him. (*Miranda*, at pp. 478-479.) Statements obtained in violation of those rights are not admissible. (*People v. Whitson* (1998) 17 Cal.4th 229, 244 (*Whitson*).) If the suspect did not expressly waive his rights, an implied waiver may be found under the circumstances of the case. (*Id.* at pp. 247-248.) In determining whether a waiver occurred, or whether a statement was coerced, we look to the age, experience, and conduct of the suspect, and whether he understood the rights he supposedly waived. (*Id.* at pp. 246-247.)

After asking Fuentes some preliminary questions about his name, address, and how to contact his father, Detective Taylor explained the *Miranda* rights to Fuentes. Taylor did not read the rights from a preprinted card, however. As part of that explanation, the following colloquy occurred.

“[Taylor]: Well, before we go any further like I said I wanna tell you – I wanna tell you about – about your rights and you say you’ve never

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<sup>2</sup> This was the second trial of Fuentes and Benavente. The first was halted midway through, and a mistrial was declared, due to juror misconduct. We will sometimes refer to Fuentes and Benavente collectively as appellants.

heard them before. You probably heard them on T.V. It goes something like this: You have the right to remain silent and anything you say can be used against you in a court of law.

“[Fuentes]: Mm Hm.

“[Taylor]: And you have the right to speak with an attorney and have an attorney present during all questioning free of charge. And if you cannot afford to hire an attorney, one will be appointed for you. That sounds . . . that sounds right? You understand what I’m saying?

“[Fuentes]: Yeah.

“[Taylor]: You understand what I’m saying? Okay.

(Pause)

“[Taylor]: Like I said when we first started, we wanna talk to you – we want to talk to you about what happened out there about the shooting. You say you don’t know about a shooting?

“[Fuentes]: No. Yeah. I was there for it – you know – I didn’t think of – I – I didn’t know that the cop shot at somebody, you know?

“[Taylor]: Do you want to talk about this with us?

“[Fuentes]: Well, I don’t really care, you know.

“[Taylor]: Well, I do.

“[Fuentes]: I mean (inaudible) I’m not shot.

“[Taylor]: Yeah, you’re not shot.

“[Fuentes]: I know. There was a lot of bullets flying around that I heard.

“[Taylor]: Okay. Well, that’s what you can talk to us about it, and we can try and figure out what happened. Were you involved in it in any way?”

After that, Fuentes began answering the questions put to him. He remained handcuffed throughout. At the end of the questioning, Detective Taylor asked Fuentes, “[Y]ou’re not going to act crazy in here right?” Fuentes said no, and Taylor took off the cuffs. He then had Fuentes sign an express waiver of his *Miranda* rights. Taylor asked

Fuentes if he could read, and Fuentes said he could. The following colloquy then occurred.

“[Taylor]: Okay. The first one is where it says, do you understand you have the right to remain silent?

“[Fuentes]: No. What again?

“[Taylor]: So answer the question. Yes or no? You said yes.

“[Fuentes]: Yeah.

“[Taylor]: So I’m just having you do it after the fact. That’s all.

“[Fuentes]: Oh.

“[Taylor]: And do you want to talk about what happened? Yes or no?

(Pause)

“[Taylor]: No? We already talked about it.

“[Fuentes]: Well I thought again.

“[Taylor]: No. Originally.

“[Fuentes]: Oh, I was just (Inaudible)

“[Taylor]: Just write your answer right there.

“[Fuentes]: (Inaudible)

After that, Fuentes signed the waiver form.

Fuentes moved to exclude his statement from evidence, contending that the advisement was incomplete. He also argued that the setting was coercive because he had just turned 16, was handcuffed throughout, had been injured when he dove to the ground by the car where Officer Barajas found him, and had been drinking alcohol. Detective Romero, who was present when Fuentes was questioned, testified at the hearing on the *Miranda* motion. Romero testified that it was unusual to keep a suspect handcuffed during questioning. Fuentes was kept handcuffed for officer safety reasons and to prevent a possible escape from the unlocked facility where the questioning took place. He also saw photos showing bruising on Fuentes’s face and said that was how Fuentes

looked during the interview. Fuentes was not given medical treatment at that time, Romero said.

Also in evidence was the transcript from the preliminary hearing. At that hearing, Taylor testified that he began to question Fuentes at 6:15 a.m. Taylor said he kept Fuentes handcuffed for safety reasons. Although Fuentes said he had been drinking the night before and that he felt drunk, he had no problem understanding the questions asked or responding to them coherently. When Fuentes was asked to sign the waiver card and indicated he did not want to answer more questions, Taylor said he stopped the interview.

The trial court said it had independently reviewed the evidence, including the preliminary hearing transcript, and found that Fuentes was properly advised of his *Miranda* rights. The court found that despite his youth, Fuentes showed no signs of confusion, or that he was “pressured, or tired, or intoxicated, or [that] his medical condition because of [his] bruising is in any way affecting his ability to respond appropriately.” Therefore, based on all the circumstances, the court found that Fuentes impliedly waived his *Miranda* rights.

On appeal, Fuentes contends the trial court erred because: (1) he was not asked if he understood the rights as explained by the officers; (2) he was not asked if he wanted to waive those rights; and (3) the detectives failed to advise him that he could stop the questioning and assert his *Miranda* rights at any time.

We review the trial court’s factual findings under the substantial evidence standard, but independently determine from the undisputed facts and those properly found by the trial court whether *Miranda* was violated. Despite our independent review of the legal effect of the facts, we give great weight to the trial court’s conclusions. (*Whitson, supra*, 17 Cal.4th at p. 248.)

We can easily dispose of Fuentes’s first and third contentions. As to the first, Detective Taylor did ask Fuentes whether Fuentes understood what he had just been told about his *Miranda* rights, and Fuentes replied that he did. As to the third, *Miranda* does not require the police to also inform a suspect that he can assert his *Miranda* rights at any

time and stop any ongoing questioning. (*U.S. v. Lares-Valdez* (9th Cir. 1991) 939 F.2d 688, 689-690; *People v. Castille* (2005) 129 Cal.App.4th 863, 885-886.)

As for the failure to ask whether Fuentes agreed to waive his *Miranda* rights, an implied waiver may be found when a suspect willingly answers questions after acknowledging he understands those rights. (*People v. Cruz* (2008) 44 Cal.4th 636, 667-668.) After saying he understood his rights and being asked whether he wanted to talk about what happened, Fuentes said he did not care, then proceeded to answer all questions put to him. Although Fuentes contends the setting was coercive due to his age, injuries caused by his fall, inebriation, and the fact that he remained handcuffed in a locked room while in the presence of three police officers, there is substantial evidence to support the trial court's contrary determination.

Even though Fuentes said he had been drinking, when asked "Are you *still* faded (drunk) from that?" Fuentes said, "Yeah, I was faded. Then when they stopped me, when the cop stopped me, I was faded." (Italics added.) This statement at least implies that Fuentes had been, but was no longer, intoxicated. Given that the interview took place more than five hours after the shooting, it seems unlikely Fuentes remained inebriated. This is confirmed not just by the cogent and coherent responses he gave, but by his initial attempted deception and swift change of direction after being told he had failed the gunpowder residue test. (See *Whitson, supra*, 17 Cal.4th at p. 249 [noting that the suspect was intelligent enough to try to deceive the officers about what had happened].) Nothing in the transcript shows that the officers questioning Fuentes were threatening or overbearing, and nothing in Fuentes's statements shows that he felt overwhelmed or coerced, or that his injuries affected him in any way. In fact, asked by Detective Romero whether he and the other officers had been "jerks with you," Fuentes answered "No." Therefore, despite his youth, the facial bruising he received when he fell to the ground, and the continued use of handcuffs during the interview, there is ample evidence that he understood his rights and waived them when he began answering questions.

## 2. *If Griffin Error Occurred, It Was Harmless*

During closing argument, the prosecutor responded to Benavente's argument about the absence of DNA tests of the guns found by the police, stating: "Why didn't the police do this? Why didn't they do that? Why didn't they do the other? [¶] It's very easy in retrospect. This is a chaotic scene. A young man lost his life. An officer was put in the position of having to chase a couple of gang members into a dark alley and ends up having to use his gun fearing for his life. [¶] [Benavente] is still here to talk about it in terms of he's not dead. I don't mean to say that he has to talk about it. Certainly, he doesn't have any obligation. He is entitled to remain silent. But he's still here with us."

Benavente objected that this last statement violated *Griffin v. California* (1965) 380 U.S. 609, 614 (*Griffin*), by commenting on his failure to testify, thereby urging the jury to infer guilt from his silence at trial. The trial court sustained the objection and instructed the jury to disregard any such inference: "Once again, ladies and gentlemen, the jurors will decide this case based on the evidence and follow the law. And as I have said repeatedly and as counsel has just acknowledged, I will reiterate, each defendant has an absolute constitutional right to remain silent and rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of any charge or allegation. [¶] No lack of testimony on the part of any defendant can make up for a missing element if the People don't establish beyond a reasonable doubt that a defendant is guilty of a charge or that an allegation is true. And that's been acknowledged by all counsel in this case. So anything to the contrary is to be disregarded by you."

Benavente contends that the court's instruction was insufficient to cure the prosecutor's *Griffin* error.<sup>3</sup> His only support for this comes from a statement in *Richardson v. Marsh* (1987) 481 U.S. 200, 211, quoted in *People v. Fletcher* (1996)

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<sup>3</sup> Fuentes joins in this argument. Respondent asks us to hold that Fuentes waived the issue because he did not object below. Because we hold that any *Griffin* error was harmless, we exercise our discretion to disregard any waiver and therefore apply our holding with equal force to Fuentes.

13 Cal.4th 451, 464, that the presumption of a curative effect from trial court admonitions is “a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.” Those decisions concerned the adequacy of instructions to disregard portions of a codefendant’s incriminating statements that implicated the other defendant, and have no bearing here. Instead, as our Supreme Court made clear just last year, in cases such as this one – where the prosecutor’s remarks were brief and ambiguous – a swift and unequivocal admonition like the one at issue here is usually sufficient to cure any *Griffin* error. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1060.) Accordingly, we hold that any such error was harmless.

3. *Evidence of a Conversation with Another Fostoria Boys Gang Member Did Not Violate the Confrontation Clause*

About a month after the shooting, Dominguez’s aunt, E.D., was at a laundromat when two men struck up a conversation with her. One of those men was Frank “Husky” Sarinana. Unaware that he was speaking with a victim’s family member, Sarinana identified himself as a member of Fostoria Boys from Bell Gardens. E.D., who knew her nephew had been killed on Fostoria Street, tried to find out whether Sarinana knew anything about what had happened. She therefore made up a story about having recently been invited to a party in Bell Gardens that was cancelled because someone had been shot. Sarinana laughed and said, “That was us.” He also said, “That was me. I shot Jesse,” and that someone from “T-Flats got shot” because they were throwing a “party in the wrong neighborhood.”

The prosecutor wanted E.D. to testify about this conversation because it was relevant to link appellants to the joint attack by four gunmen and to show that the shooting was committed by members of the Fostoria Boys gang. At trial, it was

stipulated that Sarinana was unavailable as a witness.<sup>4</sup> Appellants objected that E.D.'s testimony about her conversation with Sarinana was hearsay and should not be allowed because it did not qualify as a declaration against Sarinana's penal interest (Evid. Code, § 1230) and otherwise lacked corroboration. The trial court disagreed, and allowed the evidence. On appeal, appellants contend that allowing in evidence the hearsay statement of accomplice Sarinana, who was unavailable and could not be cross examined at trial, violated the confrontation clause of the Sixth Amendment to the United States Constitution. (*Lilly v. Virginia* (1999) 527 U.S. 116, 131-133; *People v. Duarte* (2000) 24 Cal.4th 603, 609.) We address the Sixth Amendment and hearsay arguments separately.<sup>5</sup>

The essence of a confrontation clause violation is the use of a hearsay declarant's testimonial or quasi-testimonial statements introduced without the defendant having the opportunity to cross-examine the declarant. Testimonial statements are those which, in purpose, form, and setting, are akin to testimony given by a witness at trial. Where the context and content of the conversation show a lack of the purpose, formality and solemnity associated with trial testimony, and that it was instead an informal statement made to persons not affiliated with law enforcement, the statement is not testimonial and its use does not violate the confrontation clause. (*Davis v. Washington* (2006) 547 U.S. 813, 823-827, 830, fn. 5; *People v. Cage* (2007) 40 Cal.4th 965, 984-987.) Sarinana's conversation with E.D. took place in a laundromat and appears to have been intended as nothing other than a social exchange. As such, his statements were nontestimonial, and no constitutional violation occurred.

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<sup>4</sup> Sarinana was tried separately and, at his earlier trial, refused to testify. As a result, he was deemed unavailable at appellants' trial.

<sup>5</sup> Respondent contends appellants waived their Sixth Amendment constitutional claim because they did not object on that ground. Because the new argument does not rely on facts or legal standards different from those the trial court was asked to apply, and merely asserts that the trial court's ruling had the additional legal consequence of violating the Sixth Amendment, we hold that no waiver occurred. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

To the extent appellants contend the statements were hearsay and should not have been admitted under Evidence Code section 1230, we review the trial court's ruling for an abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 585.) Evidence Code section 1230 allows evidence of out-of-court statements by an unavailable declarant if the statement was against the declarant's penal interest. The party seeking to introduce the evidence must show that the declarant is unavailable, the declaration was against his penal interest, and that the declaration was sufficiently reliable to warrant its admission. (*Geier*, at p. 585.) Only the latter requirement is at issue here. Even when a statement is truly against the declarant's penal interest, the statement must be sufficiently trustworthy in order to be admitted in evidence. This requires the court to look to all the circumstances and apply the facts with a broad and deep understanding of the way people actually conduct themselves in the setting where the statement was made. (*Ibid.*)

Appellants contend Sarinana's statements were unreliable because he appeared to be bragging to impress a woman, and because the statements were uncorroborated and no forensic evidence linked him to the shootings. T.M. testified that Sarinana was one of the party crashers, and Benavente's girlfriend admitted she told the police Sarinana was at the party. Therefore, evidence placed him at the crime scene. Sarinana was a Fostoria Boys gang member and knew that a victim – presumably E.A. – was a member of the Tortilla Flats gang. Even if Sarinana was trying to impress E.D., the circumstances show that his statements were sufficiently trustworthy and reliable to warrant their admission into evidence. We therefore hold that the trial court did not abuse its discretion by doing so.<sup>6</sup>

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<sup>6</sup> Appellants contend that the prosecutor used Sarinana's statements as part of a "guilt by association" argument that improperly connected him to them through their common gang membership. Because this argument is framed as part of appellants' effort to show that the erroneous admission of the statements was prejudicial, our holding that no error occurred means we need not discuss it. To the extent they contend that this evidence was the sole evidentiary support for the jury's verdict, we disagree. As discussed in part 4. of our DISCUSSION, *post*, there was ample tangible evidence that appellants took a direct part in the attack and in fact fired at the victims. The prosecutor's theory was that Sarinana's statement merely connected their conduct in shooting at the

#### 4. *Sufficient Evidence Supported the Verdicts*

Appellants contend there was insufficient evidence to support their convictions. Fuentes argues that the evidence established that he shot wildly and randomly, precluding a showing that he intended to aid and abet in murder or that he intended to fire at an occupied vehicle. We disagree. At least one round fired by Fuentes struck the car carrying the two victims. The other rounds were fired in that general direction. The undisputed expert testimony showed that Fuentes fired with his arm pointing somewhat downward, not up in the air as he told the police. The jury could have justifiably concluded that Fuentes was simply a bad shot, hampered perhaps by firing as he ran, but still intended to assist his fellow gang members who were closer to the two victims.

Fuentes also suggests, without citation to authority or analysis, that because he fired after Dominguez was shot, he cannot be liable as an aider and abettor. We reject this contention out of hand. Being the last of a group to fire at an intended victim should not relieve a shooter of aider and abettor liability simply because his accomplices were quicker on the draw and had better aim.

As for shooting at an occupied vehicle under Penal Code section 246, not only does aider and abettor liability apply (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1531), the crime is one of general intent and it is sufficient if the defendant fired in the direction of an occupied vehicle with reckless disregard for the possibility of striking it. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356-1358.)

Benavente contends that the only evidence linking him to the nine-millimeter Ruger found at the scene was the testimony of Officer Barajas, which he asks us to disregard because Barajas had shot him in the back and had a motive to lie in order to protect himself from charges of an unjustified shooting. As a result, his convictions for murder, shooting at an occupied vehicle, and being a felon in possession of a firearm,

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victims with other gang members for the benefit of their gang. The jury was instructed that it could use gang evidence only in order to show motive, intent, or the gang benefit allegations. Accordingly, the evidence was properly admitted and its use was properly limited.

must be reversed, he contends. Barajas's purported motive to lie presented nothing more than a credibility call for the jury to make, and we hold that the jury was entitled to credit Barajas's version if it so chose.

Finally, appellants contend their acquittals of the attempted murder of E.A. are inconsistent with the murder conviction. This inconsistency does not provide grounds for reversal of the murder conviction. (*People v. Santamaria* (1994) 8 Cal.4th 903, 910.)

5. *Failure to Instruct on Involuntary Manslaughter Was Harmless Error*

A trial court must instruct on all lesser included offenses so long as there is substantial evidence to support them. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) In addition to first and second degree murder, the trial court instructed the jury on voluntary manslaughter because it believed there was evidence to support the notion that Fuentes acted out of a mistaken belief that he needed to defend himself. Fuentes also requested an involuntary manslaughter instruction under the same theory, but the trial court refused to give it, concluding that such an instruction was inapplicable to a defendant being tried as an aider and abettor, not as the actual perpetrator. On appeal, Fuentes contends the trial court erred, not under the imperfect self-defense theory, but because there was evidence that he was guilty of brandishing his gun when he fired it. (Pen. Code, § 417, subd. (a)(2); *People v. Carmen* (1951) 36 Cal.2d 768, 775-777, overruled on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [involuntary manslaughter instruction required where defendant intended to frighten, not to injure, when he discharged weapon while brandishing it].)

We need not resolve that issue, however. Assuming for discussion's sake only that evidence supported this theory, the jury necessarily resolved the malice and intent to kill issue against Fuentes when it selected second degree murder and rejected the option of finding him guilty of voluntary manslaughter.<sup>7</sup> As a result, any error in failing to give

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<sup>7</sup> Even though we do not reach the factual basis of Fuentes's theory, it is still worth noting how little evidentiary support it has. Fuentes told the police he fired out of boredom, and only pointed his gun up in the air without the intent of injuring anyone.

the instruction was harmless. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 18-22; *People v. Polley* (1983) 147 Cal.App.3d 1088, 1091-1092.)

6. *Cumulative Error Claim*

Appellants contend reversal is required due to the cumulative prejudicial effect of the errors they have raised as grounds for reversal. We have assumed that only two such errors occurred: *Griffin* error during the prosecutor's closing argument, and the failure to instruct on involuntary manslaughter. Given the strong evidence of appellants' actual participation in the shootings, we hold that the cumulative effect of those two presumed errors was harmless.

**DISPOSITION**

The judgments are affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

MOHR, J.\*

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Not only is such a motive for firing a weapon highly suspect, his contention that he simply fired up in the air without injurious intent is squarely contradicted by the expert evidence showing that he fired in the direction of E.A.'s car, striking it at least once. Arguably then, the involuntary manslaughter instruction could have been rejected because it was not supported by substantial evidence but only by Fuentes's vague self-serving statement to the police and was squarely contradicted by the physical evidence. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.